ANALYZING ADJUSTMENT OF STATUS CLAIMS

Thursday, April 21, 2016
U.S. Department of Justice
Executive Office for Immigration Appeals
Board of Immigration Appeals
Falls Church, VA 22041

AGENDA

This session will be held in the K.D. Rooney Training Center (Tower - 18th Floor)

This presentation will provide a framework for determining whether an alien in removal proceedings can establish statutory eligibility for adjustment of status under sections 245(a) and (i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1255(a), (i), and that a favorable exercise of discretion is warranted. The statutory requirements for adjustment under sections 245(a) and 245(i) will be identified and examined. The presentation will include a discussion of the additional requirements that must be satisfied when an alien, who is inadmissible due to a criminal conviction, files a 212(h) waiver application in conjunction with an adjustment application. The presentation will also address the relevant factors to consider in determining whether removal proceedings should be continued or reopened to afford an alien the opportunity to apply for adjustment of status.

LEARNING OBJECTIVES:

By the completion of training, attendees will be able to:

- Know the legal framework for analyzing a respondent's eligibility for 245(a) adjustment;
- Identify those cases in which an Immigration Judge has no jurisdiction over a respondent's adjustment application;
- Know the relevant factors to consider in determining whether a respondent merits adjustment in the exercise of discretion;
- Know the eligibility criteria for 245(i) adjustment;
- Know the legal framework for analyzing a respondent's eligibility for a 212(h) waiver; and
- Know the relevant factors to consider in determining whether proceedings should be continued or reopened for an alien to apply for adjustment.

THURSDAY, APRIL 21, 2016

9:40 – 10:00 a.m. Registration

10:00 – 10:10 a.m. Introduction

Speaker: Teresa Donovan
Board Member
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

10:10 – 10:50 a.m. Eligibility Criteria for 245(a) Adjustment of Status

Speaker: Teresa Donovan
Attorney Advisor
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

10:50 – 11:00 a.m. Eligibility Criteria for 245(i) Adjustment of Status

Speaker: Teresa Donovan
Attorney Advisor
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

11:00 – 11:10 a.m. **Break**

11:10 – 11:25 a.m. 212(h) Waiver Filed in Conjunction with an Adjustment Application

Speaker: Teresa Donovan
Attorney Advisor
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

11:25 – 11:40 a.m. Motions to Continue and Reopen for Adjustment of Status

Speaker: Anne Greer
Board Member
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

11:40 – 11:45 a.m. Panel & Audience Discussion

Speaker: Teresa Donovan
Attorney Advisor
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

Speaker: Anne Greer
Board Member
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041

BIOGRAPHIES

ANNE J. GREER is a member of the Board of Immigration Appeals. Attorney General Michael Mukasey appointed Ms. Greer as a Board Member in August 2008. Ms. Greer received her Bachelor of Arts degree in 1980 from Allegheny College, Meadville, Pennsylvania, and Juris Doctorate in 1992 from George Mason University School of Law, Arlington, Virginia. From 2003 to 2008, she served as an Assistant Chief Immigration Judge. From 1992 to 2003, she worked as a senior panel attorney, supervisory attorney advisor, and attorney advisor for the Board of Immigration Appeals (BIA). From 1989 to 1992, Ms. Greer was a law clerk at the U.S. Department of Commerce, Office of the Chief Administrative Law Judge, in Washington, D.C. She has been an adjunct professor of law at George Mason University School of Law since 1996. Ms. Greer is a member of the District of Columbia and Commonwealth of Virginia Bars.

ANALYZING ADJUSTMENT OF STATUS CLAIMS

Board of Immigration Appeals
April 2016

I. INTRODUCTION

There are two procedures for acquiring lawful permanent resident ("LPR") status as defined in section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20). Aliens outside the United States can apply for an immigrant visa at a consular post, transit to the United States, and apply for admission as an immigrant. Qualifying aliens present in this country can apply to adjust status to that of an alien admitted for lawful permanent residence.

This outline addresses issues raised when an alien applies for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255, in removal proceedings. Adjudicating an adjustment of status application under section 245 requires a thorough understanding of the statutory requirements, including visa eligibility, visa availability, admission, parole, admissibility under section 212(a) of the Act, and waivers of inadmissibility. Additionally, the adjudicator must know the relevant factors to consider in determining whether adjustment is warranted as a matter of discretion.

This outline begins by addressing an Immigration Judge's jurisdiction over an adjustment application. Next, the eligibility criteria for adjustment under sections 245(a) and (i) of the Act are considered. Finally, the outline sets forth the standards to employ when adjudicating motions to continue, reopen, or administratively close based on a respondent's adjustment of status application. The outline can be used as a checklist when determining a respondent's eligibility for adjustment under section 245(a) or (i) of the Act in removal proceedings. The grounds of inadmissibility and corresponding waivers are covered in a general way.

II. APPLYING FOR ADJUSTMENT IN REMOVAL PROCEEDINGS

A. Jurisdiction

Generally, an alien files the Application to Register Permanent Residence or Adjust Status (Form I-485) with the United States Citizenship and Immigration Services ("USCIS"). But if an alien is in removal proceedings, he files the Form I-485 with the Immigration Judge.

If USCIS denies an alien's Form I-485, there is no right of administrative appeal. Instead, the alien will be placed in removal proceedings, in which he may renew the application. When an alien renews an I-485 before the Immigration Judge he "does not need to meet the statutory requirement of section 245(c) of the Act [e.g. not in lawful status] or § 1245.1(g) [visa availability], if, in fact, those requirements were met at the time the renewed application was initially filed with [USCIS]." 8 C.F.R. § 1245.2(a)(5)(ii). *See*

Matter of Huang, 16 I&N Dec. 362.1 (BIA 1978), *rev'g* 16 I&N Dec. 358 (BIA 1977).

Different rules apply to an "arriving alien." 8 C.F.R. § 1001.1(q) (an arriving alien is defined as an applicant for admission coming or attempting to come into the United States at a port of entry). Generally, an arriving alien files the Form I-485 with USCIS even if he is in removal proceedings. However, an arriving alien in removal proceedings will file the Form I-485 with the Immigration Judge if (1) he had an adjustment application pending with the USCIS and departed the United States with permission (advance parole); (2) he returned to the United States (pursuant to the advance parole) and was paroled into the country to continue with his pending Form I-485; (3) his pending Form I-485 was denied; and (4) he was placed in removal proceedings. 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(ii); *Matter of Silitonga*, 25 I&N Dec. 89 (BIA 2009).

B. Burden of Proof

The burden of proof is on the alien to establish eligibility for adjustment of status under section 245 of the Act. *See* section 240(c)(4)(A)(i) of the Act; 8 C.F.R. § 1240.8(d).

Important Note: Immigration Judges may not grant adjustment until the Department of Homeland Security ("DHS") has completed the biometric and related security checks. See Operating Policies and Procedures Memorandum 05-03: Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals, issued by the Office of the Chief Immigration Judge (Mar. 28, 2005).

III. SECTION 245(a) ADJUSTMENT

An Immigration Judge may grant a respondent's adjustment application pursuant to section 245(a) of the Act, if the respondent establishes that he:

1. is eligible to receive an immigrant visa,
2. has an immigrant visa that is immediately available to him,
3. has been inspected and admitted or paroled into the United States,
4. is not statutorily barred from adjustment,
5. is admissible to the United States, or, if inadmissible, is eligible for a waiver of inadmissibility, and
6. merits a favorable exercise of discretion.

This section of the outline will address these 6 core requirements.

A. Visa Eligibility

Pursuant to section 245(a)(2) of the Act, an adjustment applicant must be eligible to receive an immigrant visa. An approved family-based or employment based immigrant visa petition is evidence of visa eligibility. *See* section 204(b) of the Act (approved visa petition establishes eligibility for the visa classification sought), 8 U.S.C. § 1154(b). USCIS adjudicates visa petitions. Immigration Judges have no jurisdiction to adjudicate a visa petition.

The status of a pending visa petition can be determined by accessing the USCIS website and entering the application receipt number (https://egov.uscis.gov/casestatus/landing.do). The 13-character receipt number can be found on the Notice of Action (Form I-797) issued by USCIS.

1. Immigrant visa categories

The immigrant classifications are set forth at sections 201(b)(2)(A)(i) (immediate relatives), 203(a) (family), 203(b) (employment), and 203(c) (diversity) of the Act. Section 204 of the Act and regulations at 8 C.F.R. Part 204 set forth the filing and adjudication procedures for immigrant visa petitions.

Section 201(b)(2)(A)(i) of the Act defines immediate relatives ("IR") as the parents, spouses, and children (unmarried, under age 21) of a United States citizen ("USC").

Section 203(a) of the Act establishes these family-based preference categories:

F1: unmarried sons or daughters of USCs
F2A: spouses and children of LPRs
F2B: unmarried sons or daughters of LPRs
F3: married sons or daughters of USCs
F4: brothers or sisters of USCs

Section 203(b) of the Act establishes these employment-based preference categories:

EB1: priority workers
EB2: members of the professions and exceptional workers
EB3: skilled workers, professionals, and other workers
EB4: certain special immigrants defined in section 101(a)(27)(C)-(M) of the Act
EB5: investors

2. Derivatives

Under section 203(d) of the Act, spouses and children of aliens, who are accompanying or following to join the alien beneficiary (otherwise known as the principal beneficiary) entering the United States under one of the preference categories, are entitled to the same status as the principal beneficiary. These spouses and children derive status from the principal alien's status, and are therefore called derivative beneficiaries.

To illustrate how section 203(d) works, consider the case of Amy who is issued an immigrant visa based on an F3 visa petition. Amy is the principal beneficiary. Amy's spouse and her two children do not have to wait for her to file a visa petition for them as the spouse and child of a lawful permanent resident under section 203(a)(2)(A). Rather, they may accompany her in lawful permanent resident status pursuant to section 203(d). Amy and her family immigrate based on the one visa petition filed by Amy's USC parent. At the time that they apply for immigrant visas, Amy's children must still meet the statutory definition of a "child" (i.e. they must be unmarried and under 21).

Section 203(d) applies only to the preference categories, not to immediate relatives. Thus, if Amy from the hypothetical case above entered the United States as the child of a USC (assuming here that she was under 21 years of age and not married, but had a child), she would need to file a separate visa petition for her child.

3. Immigrant visa petition process

a. Family-based adjustment

A two-step process underlies an adjustment application based on a family-based visa petition. First, the USC or LPR (petitioner) files the Form I-130 on behalf of his or her qualifying family member (beneficiary) with USCIS. The petitioner must establish his own USC or LPR status, the bona fides of the claimed relationship to the beneficiary, and show that the family relationship meets the statutory requirements. Once the Form I-130 is approved, and an immigrant visa is immediately available, the respondent may apply for adjustment of status.

When adjustment is based on a spousal Form I-130, the issue of marriage viability can arise at the time of adjustment. A beneficiary (or respondent, if in removal proceedings) who is lawfully married, but separated from the USC or LPR spouse, may still be granted adjustment where there is no evidence of fraud in the respondent's marriage. *See Matter of Adalatkhah*, 17 I&N Dec. 404 (BIA 1980); *Hernandez v. Ashcroft*, 345 F.3d 824 (9th Cir. 2003). Where the bona fides of a marriage is at issue, the proper focus of inquiry is whether the respondent and his or her spouse intended to establish a life together at the time of the marriage. *See, e.g.*, *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975).

b. VAWA self-petitioners

Section 204 of the Act provides special self-petitioning procedures for battered spouses and children. The Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, 108 Stat. 1902-1955, added these provisions to address situations in which the abusive petitioner can withhold an immigrant visa as a form of coercion over a spouse or child. In these cases, the alien relative of the USC or LPR may file a visa petition (Form I-360) on his or her own behalf. Section 204(a)(1)(A)(iii) of the Act authorizes the battered spouse of a USC (and any child of such alien) to self-petition. Section 204(a)(1)(B)(ii) of the Act authorizes the spouse of an LPR (and any child of such alien) to self-petition.

VAWA self-petitioners are exempt from certain statutory bars to adjustment under section 245(a). For details see the attached chart comparing family-based adjustment with VAWA adjustment.

Important Note: The record of proceeding is to be labeled "battered spouse case" and is subject to strict confidentiality provisions. A breach of confidentiality can result in disciplinary action and fines.

c. Employment-based adjustment

With limited exceptions, a three-step process underlies an adjustment application based on the EB-2 and EB-3 visa classifications. First, an alien's employer or prospective employer in the United States obtains an approved labor

certification from the Department of Labor on the alien's behalf. Second, once the labor certification is approved, the employer files the Form I-140 with USCIS pursuant to sections 203(b)(2)-(3) and 204(a)(1)(F) of the Act. Once USCIS approves the Form I-140, and a visa is immediately available, the alien may apply for adjustment of status.

At the time of adjustment, the alien must show the continued existence of an offer of employment as set forth in the labor certification and Form I-140. He must also demonstrate his intent to accept the offer of employment. An alien is not required to have been employed by the petitioning employer prior to adjusting status. Nor is an alien required to evince his intent to remain at the certified job indefinitely. *See Yui Sing Tse v. INS*, 596 F.2d 831, 835 (9th Cir. 1979) (finding that an alien need not intend to remain at the certified job forever, but at the time of obtaining LPR status both the employer and the alien must intend that the alien be employed in the certified job); *see also Matter of Tien*, 17 I&N Dec. 436 (BIA 1980), *rev'd Pei-Chi Tien v. INS*, 638 F.2d 1324 (5th Cir. 1981).

d. Section 204(j) Portability Provision

Because the employment-based adjustment process can be lengthy, Congress enacted section 204(j) of the Act, to give aliens the ability to change jobs and employers during the process. This "portability" provision allows a Form I-140 visa petition – for an alien whose Form I-485 application is filed and remains unadjudicated for 180 days or more – to *remain valid* with respect to a new job if the alien changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the Form I-140 was filed. To be considered *valid,* the visa petition must have been approved by USCIS. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

The Board has reversed its decision in *Matter of Perez-Vargas*, 23 I&N Dec. 829 (BIA 2005), and concluded that because Immigration Judges have jurisdiction over adjustment applications for aliens in removal proceedings, they necessarily have jurisdiction to make determinations pursuant to section 204(j) of the Act. *See Matter of Marcal Neto*, 25 I&N Dec. 169 (BIA 2010).

In making a 204(j) determination, first ascertain whether the Form I-485 has been pending for more than 180 days. If so, determine whether the certified job and the new job are in the same or similar occupational classifications. *See* USCIS Policy Memo (PM-602-0122.1) dated March 18, 2016 providing additional guidance on determining whether the new job is in the same or similar occupational classification as the original job.

e. Section 204(l) Relief for surviving relatives

Prior to the enactment of section 204(l), the death of the visa petitioner or principal beneficiary resulted in the automatic revocation of the family-based and employment-based visa petition or if the petition was pending at the time of death it could not be approved. Under section 204(l), surviving relatives can continue to pursue adjustment of status so long as one of them was residing in the U.S. at the time the petitioner or principal beneficiary died and continues to reside in the U.S. at that time the petition or application is adjudicated.

B. Visa Availability

1. Determining visa availability

After the Form I-130 is approved, the alien beneficiary cannot apply for adjustment of status until an immigrant visa is available. With the exception of immediate relatives ("IR"), only a limited number of visas can be issued yearly to alien relatives of USCs and LPRs. Sections 201 and 202 of the Act provide formulas for allocating visas. Rather than attempt calculations to determine whether a visa is available, practitioners of immigration law rely on the Visa Bulletin, which is issued each month by the U.S. Department of State, Bureau of Consular Affairs, at http://travel.state.gov.

The Visa Bulletin identifies the *cut-off date* for family-based and employment-based categories. The date a family-based visa petition is filed with USCIS is the alien's *priority date*. The priority date determines his place in the visa line. 8 C.F.R. § 204.1(c). The date a labor certification is filed with the Department of Labor is the alien's priority date. If no labor certification is required, the alien's priority date is the date the visa petition is filed with USCIS.

When an alien's priority date is *earlier* than the cut-off date referenced in the Visa Bulletin, a visa is available and the alien can apply for adjustment of status. Because of these annual numerical limits on immigrant visas, an alien may be the beneficiary of an approved immigrant visa petition, but unable to apply for adjustment because no visas are available. This can amount to years of waiting in line in the designated category for a visa to become current. If the principal beneficiary has a spouse and children (derivative beneficiaries), they wait, too. When a visa becomes available for the petitioner, visas also become available for derivative spouses and children. Remember that immediate relatives (parents, spouses, and children) of USCs are *not* subject to these numerical limitations.

In September 2015, USCIS (in conjunction with the Department of State) revised its procedures for determining visa availability for applicants waiting to file applications for adjustment of status based on the family and employment preference categories. *See* sections 203(a) and (b) of the Act. The monthly Department of State Visa Bulletin now provides two charts for the family-based preferences and two charts for the employment-based preferences. One chart identifies the dates when visas may be issued (Application Final Action Dates). The other chart identifies the earliest dates when aliens may file their adjustment of status applications (Dates for Filing Applications).

2. Visa number regression

At times the preference categories can be oversubscribed and visa numbers regress. That happens when an immigrant visa was available at the time the applicant filed the Form I-485, but it is no longer available when USCIS or the Immigration Judge is ready to adjudicate the application. In that case, where an adjustment application cannot be approved *solely* because a visa number is not available, the application may be held in abeyance pending the allocation of a visa number. *See, e.g.*, *Matter of Ho*, 15 I&N Dec. 692 (BIA 1976); *Matter of Briones,* 24 I&N Dec. 355, 357 (BIA 2007). An application cannot be held in abeyance if the alien is ineligible for adjustment for reasons other than the lack of a visa number. *See Matter of Ko*, 15 I&N Dec. 695 (BIA 1976).

3. Priority date retention

In certain cases, an alien who is the beneficiary of more than one approved visa petition may keep the earlier priority date. For example, an alien who is the beneficiary of more than one approved

employment-based visa petition filed under sections 203(b)(1), (2) or (3) of the Act, may retain the earliest priority date, so long as the petition has not been revoked or denied. *See* 8 C.F.R. § 204.5(e).

In the family-based context, retention of priority dates has been limited to visa petitions filed by the same family member. *See* 8 C.F.R. § 204.2(h)(2) (the original priority date will be retained if the subsequent visa petition is filed by the same petitioner).

4. Automatic conversion of preference classification

Under 8 C.F.R § 204.2(i) of the Act, Form I-130 visa petitions automatically "convert" from one preference category to another on the occurrence of an event and without the filing a new visa petition. For example, a change in the *beneficiary*'s marital status or age or a change in the *petitioner's* citizenship can result in the automatic conversion of the beneficiary's preference classification.

To illustrate how this works, consider the case of Alberto, an LPR, who filed a visa petition on behalf of his spouse, Sue, in 2013. The visa petition was quickly approved, according Sue F2A visa classification. In 2015, Alberto becomes a USC. The visa petition automatically converts from F2A to IR status. Alberto does not need to file a new visa petition for Sue. But if the visa petition filed for Sue included her two children (who qualify as Alberto's step-children) then Alberto would need to file a visa petition for each child seeking immediate relative status.

5. Child Status Protection Act

Prior to the enactment of the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) ("CSPA"), if a child was the beneficiary or derivative beneficiary of an immigrant visa petition and did not obtain LPR status before reaching the age of 21, he "aged-out." Because he no longer met the statutory definition of a child (unmarried person under the age of 21), he either lost visa eligibility altogether or was subject to an automatic conversion.

As an example, assume that Marcella, a USC, filed a visa petition for her 20-year-old son Thomas. The IR visa petition was approved. On the basis of that petition, Thomas applied for an immigrant visa at the U.S. Embassy in Rome, Italy. Before he was issued the visa, Thomas turned 21. Because Thomas is no longer a child, he is ineligible for IR

classification. Under the old law, the petition would be automatically reclassified to F1 and Thomas would wait years for a visa to become available.

The CSPA amended the Act to allow an alien to retain his "child" status even though he reached the age of 21 while USCIS was processing his immigrant visa petition, immigrant visa application, or adjustment of status application. The CSPA took effect on August 6, 2002. *See generally Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007) (holding that the CSPA applied where the Form I-130 was filed before CSPA's effective date but the adjustment application was filed after that date). The CSPA amendments are scattered throughout the Act. To apply the correct provision, first determine whether the child's parent is a USC, LPR, asylee, or refugee. Once you know that, you can proceed to the governing provision.

a. Children of USCs

The three rules that apply to the children of USCs are set forth in section 201(f) of the Act. Rule 1 is that when a USC parent files a visa petition for his child, the child's *age is fixed* on the date the Form I-130 is filed. If the child is under 21 on that date, he will remain eligible for adjustment as an IR. Recall from the example above that Marcella filed the visa petition for her son Thomas when he was 20 years old. Even if Thomas was 22 years old when he applied for the immigrant visa in Rome, he would still be classified as a "child," pursuant to section 201(f)(1) of the Act, because his age was fixed when his USC mother filed the visa petition.

Rules 2 and 3 involve a conversion from one visa category to another. Rule 2 applies to a visa petition filed by an LPR parent who naturalizes. In that case, the child's *age is fixed* on the date of a parent's naturalization. If the child is under 21, he will remain eligible as an IR. If he was over 21, he will be eligible for F1 classification. Suppose Marcella was an LPR when she filed a visa petition for her 20-year-old son, Thomas. If Thomas was 20 when his mother naturalized, he would remain a child, that is, an IR. If he was over 21, and still unmarried when his mother naturalized, he would be eligible for F1 classification.

Rule 3 applies to a visa petition filed by a USC parent for a married child. In that case, the child's *age is fixed* on the date of his or her divorce. If the child is under 21, he will be eligible for IR classification. If he is over 21, he is eligible for F1 classification. Suppose that Marcella filed an F3 visa petition on behalf of Thomas (because he was married). Should Thomas divorce, the petition would convert to IR if he was under 21. If he was over 21, the visa petition would automatically convert from F3 to F1.

b. Children of LPRs

The rule governing the age of children of LPRs has engendered much litigation. The rule is found in section 203(h)(1) of the Act. It addresses the period of time between the filing of the visa petition and the agency approving the petition. This provision allows certain aged-out beneficiaries to retain "child" status during the time it takes for USCIS to adjudicate the petition. The child's *age is fixed* on the date a visa number becomes available *less* the number of days it takes USCIS to adjudicate the petition. The child's age is fixed only IF the child *sought to acquire LPR status* within one year of the date the visa became available.

Consider this. Jose was born in Mexico in 1987. He entered the United States unlawfully when he was 7 years old. In 2005, his LPR father, Manuel, filed an F2A visa petition for him. The petition was approved in 2009, when Jose was 22 years old. On March 1, 2011, a visa number became available. Within two weeks Jose hired an attorney. Jose did not have any document showing that his father had filed a visa petition for him. His attorney immediately filed a Freedom of Information Act ("FOIA") request with USCIS to obtain Jose's immigration file. Six months later they received the FOIA request. Jose filed his adjustment application in May 2012.

If he sought to acquire LPR status within one year of the date on which the visa became available, then his age on March 2011 (24 years old) would be reduced by the 4 years it took USCIS to adjudicate his visa petition (filed in 2005 and approved in 2009). His age for immigration purposes would thus be 20, so he would meet the F2A requirements. But if he did not seek to acquire status within the one-year period, then his actual age would be used to determine visa availability. So he would fall into the

F2B category, which would mean continuing to wait for a visa to become available. The difference between F2A and F2B is significant. As of April 2016, the cut-off date for Mexican nationals in the F2A category is July 22, 2014,whereas the cut-off date for Mexican nationals in the F2B category is September 8, 1995.

What does "sought to acquire" mean? Does it mean hiring a lawyer? Filing a FOIA request? Or, does it mean actually filing the immigrant visa application or the adjustment application? The Board interpreted this statutory phrase to require the alien to file an application by the one-year deadline, unless extraordinary circumstances prevented him from doing so. *See Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012).

Section 203(h)(3) of the Act applies to those aliens whose age is determined in section 203(h)(1) to be 21 years of age or older. This provision addresses the period of time between the approval of the visa petition and the availability of a visa. Consider the case of *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009). Wang acquired LPR status based on an F4 visa petition filed on his behalf in 1992. Wang was issued a visa. His daughter no longer qualified as a derivative under section 203(d) because she was over 21. After his admission as an LPR, Wang filed an F2B visa petition on behalf of his daughter. Wang asked USCIS to give his daughter the 1992 priority date associated with his own F4 petition. USCIS said no. Wang appealed.

The Board affirmed USCIS's position. The Board reasoned that the phrases "automatic conversion" and "priority date retention" used in section 203(h)(3) have recognized meanings, which include a requirement that the visa petitioner be the same before and after the conversion. 8 C.F.R. § 204.2(i). Thus, the Board concluded that Wang's priority date could not be used by his daughter. There could be no automatic conversion because there is no visa category for the nieces of USCs. There could be no retention of the priority date because the visa petitioners were not the same before and after the conversion. The 1992 visa petitioner was Wang's sister. The petitioner of the second petition was Wang. *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191, 2213 (2014) (deferring to the Board's interpretation of section 203(h)(3) set forth in *Matter of Wang*).

c. Children of asylees and refugees

The rules governing the children of asylees and refugees are set forth at sections 208(b)(3) and 207(c)(2) of the Act, respectively. The age of the child is fixed as of the date the asylum application (Form I-589) or the refugee petition (Form I-590) is filed. *See Matter of A-Y-M-*, 25 I&N Dec. 791 (BIA 2012).

C. Inspected and Admitted or Paroled

An adjustment applicant must establish that he has been "inspected and admitted or paroled" into the United States. Section 245(a) of the Act. Section 101(a)(13)(A) of the Act defines admission as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." In the past, aliens who were inspected and authorized to enter the United States were issued an Arrival/Departure Card (Form I-94). The I-94 is evidence of one's admission. Customs and Border Protection (CBP) now gathers air and sea travelers' arrival/departure information automatically from electronic travel records, so paper I-94s are only issued in limited circumstances. *See* 78 Fed. Reg. 18,457 (Mar. 27, 2013). However, travelers may request their I-94 number and related arrival/departure information online at https://i94.cbp.dhs.gov/I94/consent.html.

An alien without proof of entry can still satisfy the inspection and admission requirement by showing a procedurally regular entry which does not require the alien to be questioned or admitted in a particular status. *See, e.g.*, *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

An alien's parole into the U.S. "for urgent humanitarian reasons or significant public benefit," under section 212(d)(5)(A) of the Act can establish adjustment eligibility. But, an alien's conditional parole from detention, pursuant to section 236(a) of the Act does not satisfy the parole requirement. *See Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010) (holding that an alien released into the United States on conditional parole is ineligible for adjustment); *see also Cruz-Miguel v. Holder*, 650 F.3d 189 (2d Cir. 2011) (deferring to the Board's holding in *Castillo-Padilla*).

The Sixth Circuit has concluded that an alien granted Temporary Protected Status ("TPS") has been inspected and admitted for adjustment eligibility purposes. *See Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013). On arguably different facts, the Eleventh Circuit found otherwise. *See Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011) (holding that a grant of TPS does not constitute an admission).

D. Bars to Adjustment

1. Section 245(c) bars

Subsections (1) through (8) of section 245(c) of the Act make the following classes of aliens ineligible for adjustment of status under section 245(a), unless they are VAWA self-petitioners:

(1) crewmen. *See Matter of G-D-M-*, 25 I&N Dec. 82 (BIA 2009) (analyzing the definition of crewman for cancellation of removal eligibility purposes).

(2) subject to section 245(k) (certain employment-based applicants are eligible to adjust in spite of sections 245(c)(2), (7) and (8), if the unlawful status or unauthorized employment lasted less than an *aggregate* of 180 days), *other than immediate relatives*, aliens who have worked without authorization or who (through no fault of their own or "for technical reasons") have failed to maintain continuously a lawful status. *Matter of L-K-*, 23 I&N Dec. 677 (BIA 2004) (interpreting "for technical reasons"). "Lawful immigrant status" does not include any period during which a subsequently denied adjustment application is pending. 8 C.F.R. § 1245.1(d)(1). *See Dhuka v. Holder*, 716 F.3d 149 (5th Cir. 2013); *Chaudhry v. Holder*, 705 F.3d 289 (7th Cir. 2013).

(3) aliens admitted in transit without a visa under section 212(d)(4)(C) of the Act.

(4) *other than immediate relatives*, aliens admitted without a visa under section 212(l) or 217 of the Act. An alien who enters under the section 217 visa waiver program ("VWP") is allowed to remain in the United States for up to 90 days and agrees not to contest any removal action. *See* section 217(b)(2) of the Act (no-contest provision). Seven circuit courts have concluded that aliens admitted under the VWP may apply for adjustment only if they do so *within* the 90-day authorized period. *See Bradley v.*

Att'y Gen. of the U.S., 603 F.3d 235, 242 n.7 (3d Cir. 2010) (and cases cited therein).

(5) aliens admitted as S nonimmigrants. However, they may be eligible to adjust under section 245(j) of the Act.

(6) aliens deportable under section 237(a)(4)(B) of the Act (terrorist activities).

(7) employment-based applicants who are not in a lawful nonimmigrant status.

(8) aliens employed without authorization or otherwise violated the terms of nonimmigrant status.

2. Section 245(d) and (f) bars

Under sections 245(d) and (f) of the Act, conditional residents under section 216 of the Act, and alien entrepreneurs under section 216A of the Act, cannot adjust status under 245(a) of the Act. *See* 8 C.F.R. §§ 245.1(c)(5), 1245.1(c)(5).

Section 245(d) of the Act also provides that an alien who enters the U.S. as a nonimmigrant under section 101(a)(15)(K) of the Act may not adjust under section 245(a) except to that of a conditional resident under section 216 of the Act as a result of marriage of the nonimmigrant (or, in the case of a child, the parent) to the citizen who filed the petition. *See Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011) (holding the fiancé visa holder may be granted adjustment of status under sections 245(a) and (d) if the applicant can demonstrate he entered into a bona fide marriage within a 90-day period to the petitioner); *Matter of Le*, 25 I&N Dec. 541 (BIA 2011) (extending *Sesay* to the derivative child of an alien fiancé).

3. Section 245(e) bar

An alien seeking an immigrant visa based on a marriage entered into during proceedings cannot adjust unless he can establish by clear and convincing evidence that the marriage was entered into in good faith and not for immigration purposes. Only USCIS has the authority to grant a visa petition under the bona fide marriage exemption pursuant to sections 245(c)(3) and 204(g) of the Act.

4. Other statutory bars

a. An alien who made a *frivolous asylum application* is permanently ineligible for adjustment. Section 208(d)(6) of the Act.

b. An *exchange visitor* under section 101(a)(15)(J) of the Act who has not met the 2-year foreign residency requirement or obtained a waiver of that requirement is ineligible for adjustment. Section 212(e) of the Act.

c. An alien who was ordered removed *in absentia* is ineligible for adjustment for 10 years from the date the removal order was issued. Section 240(b)(7) of the Act.

d. An alien who was *granted voluntary departure* and failed to depart within the specified period is ineligible for adjustment of status for a 10-year period. Section 240B(d) of the Act.

e. Certain nonimmigrants under sections 101(a)(15)(A) (foreign diplomats and officials), (E) (treaty traders and investors) and (G) (employees of international organizations) of the Act who have not executed and submitted a written waiver of their privileges and immunities are ineligible for adjustment of status. Section 247(b) of the Act.

E. Admissibility & Waivers of Inadmissibility

1. In General

To be eligible for adjustment of status, an applicant has the burden to show that he is clearly and beyond doubt entitled to be admitted to the United States and is not inadmissible under section 212(a) of the Act. *See* sections 240(c)(2)(A), 240(c)(4), 245(a) of the Act. Section 212(a) of the Act describes various categories of aliens who are inadmissible to the United States, including criminals, immigration law violators, and persons who may become a public charge. The law provides for waivers of certain grounds of inadmissibility.

Select grounds of inadmissibility and corresponding waivers are listed in the attached chart.

2. Section 212(a)(9)(C)

a. Re-entry after unlawful presence under 212(a)(9)(C)(i)(I)

An alien who is inadmissible under section 212(a)(9)(C)(i)(I), is ineligible for adjustment under section 245(i). *See Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). In 2012, the Ninth Circuit deferred to *Briones* and adopted a 5-factor test for determining whether *Briones* applies retroactively. *See Garfias-Rogriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012). The Tenth Circuit reached a similar result in *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015).

b. Re-entry after removal under 212(a)(9)(C)(i)(II)

An alien who is inadmissible under 212(a)(9)(C)(i)(II), is ineligible for adjustment under section 245(i). *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The Ninth Circuit deferred to *Torres-Garcia*, but held that the case does not apply retroactively to all cases and a settlement agreement was entered into. *See Gonzales v. DHS*, 712 F.3d 1271 (9th Cir. 2013). USCIS issued a policy memo (PM-602-0121) dated August 25, 2015, providing additional guidance implementing the Settlement Agreement.

3. Section 212(h) waiver

a. Statutory eligibility

Section 212(h) of the Act authorizes a waiver of certain grounds of inadmissibility for immigrants or aliens applying for an immigrant visa:

- 212(a)(2)(A)(i)(I) (crime involving moral turpitude)
- 212(a)(2)(A)(i)(II) (*only* a single offense of simple possession of less than 30 grams of marijuana)
- 212(a)(2)(B) (multiple criminal convictions)
- 212(a)(2)(D) (prostitution or commercialized vice)
- 212(a)(2)(E) (aliens who have asserted immunity from prosecution)

Section 212(h)(1) of the Act authorizes *three separate waivers* for these criminal offenses under sections (A), (B), and (C). A waiver applicant must establish statutory eligibility and that the

waiver should be granted in the exercise of discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996). *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), *aff'd, Cervantes-Gonzalez v. INS*, 244 F.3d 1001 (9th Cir. 2001) (listing the factors to consider in making an extreme hardship determination).

b. Bars

A waiver may not be granted to "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States." Section 212(h) of the Act. After much litigation, the Board withdrew from its prior position and now holds that this provision only applies to aliens who *entered the United States as lawful permanent* residents, not aliens who adjusted status. *See Matter of J-H-J-* , 26 I&N Dec. 563 (BIA 2015).

Aliens convicted of murder, or criminal acts involving torture or conspiracy or an attempt to commit the same are ineligible for a 212(h) waiver.

c. Favorable exercise of discretion

Pursuant to section 212(h)(2), an alien must also show that he merits the waiver in discretion. *See Matter of Mendez,* 21 I&N Dec. 296, 300 (BIA 1996) (providing that the discretionary analysis set forth in *Matter of Marin* 16 I&N Dec. 581 (BIA 1978) (listing the relevant positive and adverse discretionary factors) is an appropriate general guide in 212(h) cases).

d. Heightened discretionary standard

The Attorney General, in general, will not favorably exercise discretion under section 212(h)(2) of the Act in cases involving violent or dangerous crimes, except:

> in extraordinary circumstances, such as those involving national security or foreign policy

> considerations, or cases in which an alien clearly demonstrates that the denial of the application . . . would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

8 C.F.R. § 1212.7(d); *Matter of Jean*, 23 I&N Dec. 373, 383 (BIA 2002). The regulation governs only the exercise of discretion after the alien has met the threshold statutory requirements.

e. Stand-alone 212(h) waiver

A 212(h) waiver is not available on a stand-alone basis to an alien in removal proceedings without a concurrently filed adjustment application. *See Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013), *petition denied in Rivas v. U.S. Att'y Gen.,* 765 F.3d 1324 (11th Cir.2014); *see also Matter of Y-N-P-*, 26 I&N Dec. 10, 16 (BIA 2012) (stating that an inadmissible alien in removal proceedings can only file a 212(h) waiver concurrently with an adjustment application). However, a lawful permanent resident seeking readmission after a trip abroad can file a stand-alone 212(h) waiver. *See Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007).

F. Adjustment in Discretion

An adjustment applicant must establish that he merits adjustment in the exercise of discretion. The applicant's equities must outweigh the adverse factors. Equities include the existence of family ties in the United States, the length of residence in the United States, and the hardship to the alien and family of traveling abroad to apply for an immigrant visa. *See Matter of Blas*, 15 I&N Dec. 626 (BIA 1974; A.G. 1976). Generally, in the absence of adverse factors, adjustment will be ordinarily granted in discretion. *Matter of Arai*, 13 I&N Dec. 494 (BIA 1974).

However, a heightened standard applies to the discretionary determination on adjustment of status if it is determined that the alien has committed a violent or dangerous crime. In that case, the "extraordinary circumstances" standard from *Matter of Jean,* 23 I&N Dec. 373, 383 (BIA 2002), applies rather than

the presumption in favor of an adjustment of status from *Matter of Arai, supra*. *See Torres-Valdivias v. Lynch*, 786 F.3d 1147 (9th Cir. 2015) (upholding the Board's conclusion that the *Matter of Jean* standard applies to applications for adjustment of status under section 245(a) of the Act, in which the alien has been convicted of a violent or dangerous crime).

An Immigration Judge can properly pretermit the question of statutory eligibility and deny the application in the exercise of discretion. *See INS v. Bagamasbad*, 429 U.S. 24 (1976).

IV. SECTION 245(i) ADJUSTMENT

An alien eligible 245(i) treatment can adjust status even if he has not been inspected and admitted or paroled into the United States, or he falls within the 245(c) bars. Section 245(i)(1)(A) of the Act. In addition to meeting the 245(i) requirements, the applicant must also satisfy the 245(a) adjustment requirements, including visa eligibility, visa availability, admissibility, inapplicability of other statutory bars, and discretion.

A. Grandfathered aliens

Although section 245(i) has expired, it remains available to an alien who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of a visa petition or labor certification that was *properly filed* on or before April 30, 2001, and the visa petition or labor certification was *approvable when filed*. Section 245(i)(1)(B) of the Act; 8 C.F.R. § 1245.10(a)(1). In a trilogy of cases, the Board has defined grandfathered aliens (and spouses and children of grandfathered aliens) who are eligible for 245(i) adjustment. *See Matter of Estrada*, 26 I&N Dec. 180 (BIA 2013); *Matter of Ilic*, 25 I&N Dec. 717 (BIA 2012); *Matter of Legaspi*, 25 I&N Dec. 328 (BIA 2010).

B. Properly filed and approvable when filed

The term "properly filed" is defined at 8 C.F.R. § 1245.10(a)(2). A labor certification or visa petition is *approvable when filed* if it was (1) properly filed, (2) meritorious in fact, and (3) non-frivolous. 8 C.F.R. § 1245.10(a)(3); *Matter of Butt*, 26 I&N Dec. 108 (BIA 2013). A labor certification or visa petition is considered *properly filed* if it is postmarked or received on or before April 30, 2001. *See, e.g.*, *McCreath v. Holder*, 573 F.3d 38 (1st Cir. 2009) (holding that a visa petition that was submitted on April 4, 2001, but rejected for lack of the filing fee and resubmitted on May 21, was **not** properly filed by April 30); *Blanco v. Holder*, 572 F.3d 780 (9th Cir. 2009) (holding that a visa petition filed on April 29, 2001, but rejected because the

filing fee check was unsigned and resubmitted on September 4, **was** properly filed by April 30).

A spousal visa petition is *meritorious in fact* if the alien demonstrates that the marriage was bona fide at its inception. *See Matter of Jara Riero and Jara Espinol*, 24 I&N Dec. 267 (BIA 2007). An alien will be presumed to be the beneficiary of a *meritorious-in-fact* labor certification if the application was "properly filed" and "non-frivolous," and if no apparent bars to approval of the labor certification existed at the time it was filed. *See Matter of Butt*, 26 I&N Dec. 108 (BIA 2013).

C. Physical presence requirement

If the qualifying labor certification or visa petition was filed after January 14, 1998, the applicant must also show that he was physically present in the United States on December 21, 2000; however, the physical presence requirement does not apply to a spouse or child of the grandfathered principal alien. Section 245(i)(1)(C) of the Act; 8 C.F.R. §§ 1245.10(a)(1)(ii), 1245.10(n)(1); *Matter of Ilic*, 25 I&N Dec. 717 (BIA 2012).

V. MOTIONS

A. Motions to continue

An "Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. § 1003.29. Where an alien seeks a continuance to apply for adjustment of status based on a pending family-based visa petition (Form I-130, Petition for Alien Relative), the Immigration Judge should consider these factors to determine if good cause is established:

> (1) the DHS's response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors.

See Matter of Hashmi, 24 I&N Dec. 785, 790–91 (BIA 2009) (describing these factors as illustrative, not exhaustive, and noting that the focus of the inquiry is the likelihood that the application will be granted).

Where an alien seeks a continuance to apply for adjustment based on a pending labor certification or employment-based visa petition (Form I-140, Immigrant Petition for Alien Worker), the Immigration Judge should first determine the respondent's place in the employment-based adjustment of status process and then consider and balance the *Hashmi* factors if applicable, and any other relevant considerations. *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009). The focus of the inquiry is the likelihood of success on the adjustment application. For example, an alien who has a prima facie approvable Form I-140 and adjustment application may not be able to show good cause for a continuance because visa availability is too remote. *Id.* at 136. Even under those circumstances, the Immigration Judge must evaluate the individual facts and circumstances relevant to each case. *Id.* Whether *Hashmi* or *Rajah* applies, the Immigration Judge must consider all the relevant factors. *See, e.g.*, *Ferreira v. U.S. Att'y Gen.*, 714 F.3d 1240, 1243 (11th Cir. 2013).

B. Motions to reopen

A motion to reopen removal proceedings to apply for adjustment of status must satisfy the general statutory and regulatory requirements for a motion to reopen. *See* section 240(c)(7) of the Act, 8 U.S.C. §1229a(c)(7); 8 C.F.R. §§ 1003.2(c), 1003.23.

A motion to reopen to apply for adjustment of status based on a marriage entered into after the commencement of proceedings may be granted, in the exercise of discretion, notwithstanding the pendency of a visa petition filed on the alien's behalf, where:

> (1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide; and (5) the [DHS] either does not oppose the motion or bases its opposition solely on *Matter of Arthur*[, 20 I&N Dec. 475 (BIA 1992)].

Matter of Velarde, 23 I&N Dec. 253, 256 (BIA 2002). The fifth factor does not grant the DHS veto power over an otherwise approvable *Velarde* motion. *Matter of Lamus*, 25 I&N Dec. 61 (BIA 2009).

C. Motions to administratively close

An alien in proceedings may seek administrative closure where he is the beneficiary of a pending or approved visa petition that may render him eligible for adjustment when approved or when a visa is available.

In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), the Board identified the relevant factors an Immigration Judge should consider in determining the propriety of administrative closure: (1) the reasons for the request; (2) the basis for any opposition to administrative closure; (3) the likelihood that the respondent will succeed on any petition, application, or other action he is pursuing outside of removal proceedings; (4) the anticipated duration of the administrative closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings when the case is recalendared. Administrative closure essentially functions as a continuance in giving the Immigration Judge the power to defer further action for a period of time. *Id.* at 691–92. Nevertheless, administrative closure is generally not appropriate for an event or action that is certain to occur, but not within a reasonable period of time, such as remote availability of a visa number. *Id.* at 696. Additionally, the Board has explained that such action is not appropriate where the respondent's ultimate eligibility for relief from removal is speculative.

VI. APPENDICES

A. Chart: *Family-based adjustment of status process*
B. Chart: *Employment-based adjustment of status process*
C. Chart: *Compare family-based adjustment with VAWA adjustment*
D. Chart: *Selected grounds of inadmissibility & waivers*

Compare Family-Based Adjustment of Status with VAWA Adjustment

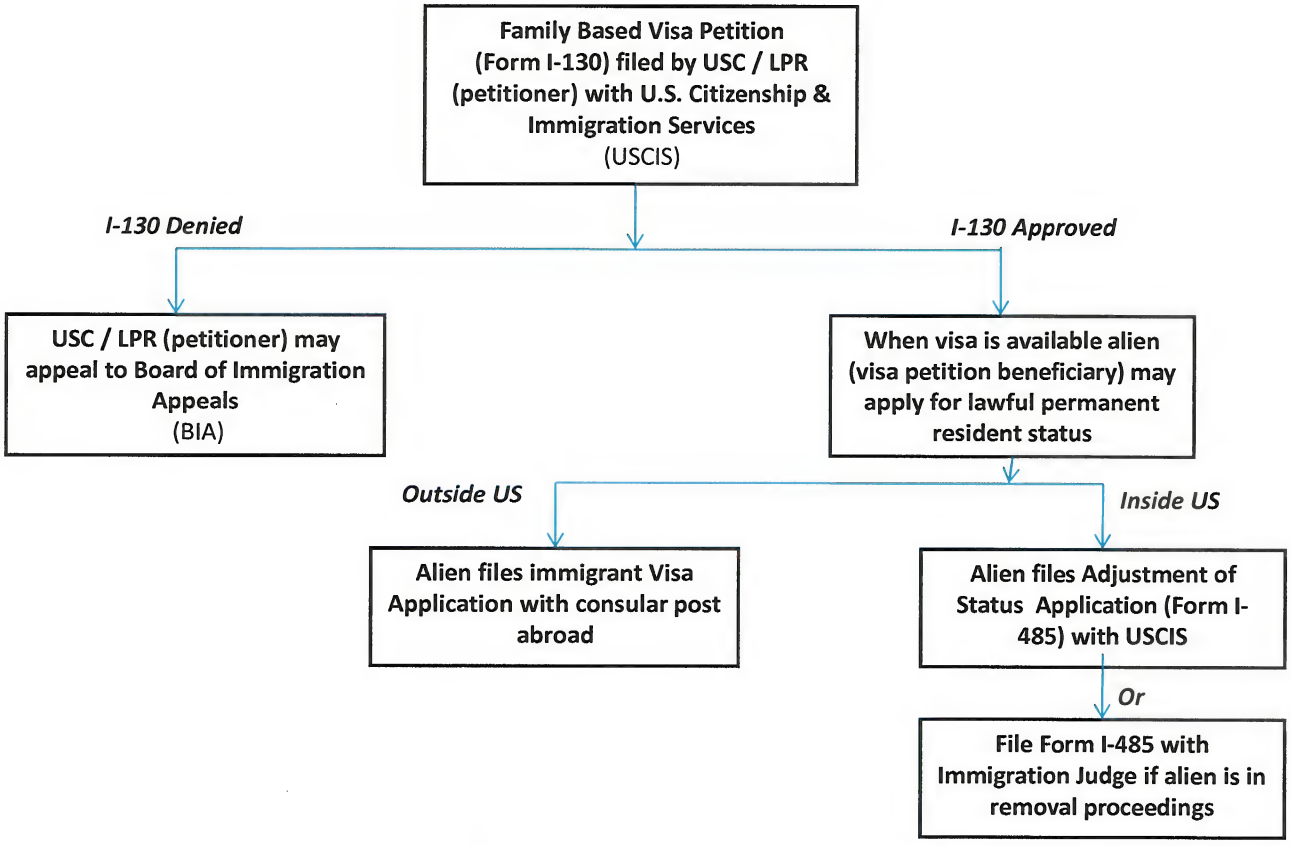
Form of Relief	AOS based on a family-based I-130 visa petition	AOS based on a VAWA I-360 self-petition
Application Process	1. Petition (Form I-130) filed with USCIS 2. Once I-130 approved and visa is available, Beneficiary will apply for adjustment of status (Form I-485).	1. Petition (Form I-360) filed with USCIS 2. USCIS issues a *Notice of Prima Facie Eligibility* if I-360 is complete and evidence supporting eligibility criteria is submitted. 8 C.F.R. § 204.2(c)(6) 3. If I-360 approved, Petitioner eligible for work authorization while awaiting a visa.
Step 1 Visa Petition		
Who can file Petition?	Sections 201(b)(2)(A) & 203(a) Petitioner is a USC or LPR	Sections 204(a)(1)(A) & (B): Self-Petitioner is: - abused spouse of USC or LPR - abused child of USC or LPR - can file to age 25 if delay related to abuse - non-abused spouse of USC or LPR whose child was abused by spouse - abused parent of USC son or daughter
Visa Petition Requirements	Sections 201(b)(2)(A) & 203(a) 8 C.F.R. § 204.2(a) 1. Petitioner's USC or LPR status 2. Establish the family relationship 3. For spousal petitions, evidence to establish the bona fides of the marriage	Section 204(a)(1)(A) & (B) 8 C.F.R. §§ 204.2(c), (e) 1. Petitioner has been subject to *battery or extreme cruelty* by USC or LPR 2. Good faith marriage to USC or LPR. All relevant evidence should be considered. 3. Residence with abuser 4. With some exceptions, self-petitioner must be currently living in the US 5. Good moral character

Form of Relief	AOS based on a family-based I-130 visa petition	AOS based on a VAWA I-360 self-petition
Visa Availability	If the petitioner is a USC then the beneficiary is an immediate relative. If the petitioner is an LPR, the beneficiary is eligible for classification under section 203(a)(2)(A) of the Act.	If the abuser is a USC then the self-petitioner is an immediate relative. If the abuser is an LPR, the self-petitioner is eligible for classification under section 203(a)(2)(A) of the Act.
Child Status Protection Act Applies	Sections 201(f) and 203(h) of the Act.	Sections 203(h)(4) and 204(a)(1)(D) of the Act.
Step 2 Adjustment of Status		
Jurisdiction	File the I-485 with USCIS unless the Applicant is in proceedings.	File the I-485 with USCIS unless the Applicant is in proceedings.
Inspected and Admitted or Paroled	Applicant must have been inspected and admitted or paroled under 245(a).	Applicant is exempt from this requirement under 245(a).
Statutory Bars	Applicant subject to 245(c) bars.	Applicant not subject to 245(c) bars.
Admissibility & Waivers	Applicant must establish admissibility. If inadmissible, waivers are available.	Applicant must establish admissibility, however *broad VAWA waivers available*: 212(a)(4)(C)(i) (can submit waiver (I-864W) instead of affidavit of support 212(a)(6)(A)(ii) (unlawful entry) 212(a)(9)(B)(iii)(IV) (unlawful presence) 212(a)(9)(C)(iii) (permanent bar) 212(g)(1)(C) (medical) 212(h)(1)(C) (criminal) 212(i)(1) (fraud)
Section 240B(d) bar	Applicant is barred if fail to depart per 240B.	Applicant is not barred if fail to depart per 240B if related to abuse. 240B(d)(2).

Form of Relief	AOS based on a family-based I-130 visa petition	AOS based on a VAWA I-360 self-petition
Derivative children	Section 203(d) of the Act. Derivative children authorized only for preference immigrants.	Sections 204(a)(1)(A)(iii)(I), (iv), (B)(ii)(I), (iii) of the Act. Derivative children authorized for immediate relatives & preference immigrants.
Discretion	Applicant must merit favorable exercise of discretion.	Applicant must merit favorable exercise of discretion.

Disclaimer: This document is intended for internal EOIR and informational purposes only. It is not intended as a comprehensive or definitive statement on all issues concerning family-based adjustment of status or VAWA self-petitioning adjustment of status, nor does it represent all interpretations or perspectives on these forms of relief. The information set forth in this document does not represent the positions of the Board of Immigration Appeals, the Executive Office for Immigration Review, the Department of Justice, the Attorney General, or the U.S. Government.

ACQUIRING LAWFUL PERMANENT RESIDENT STATUS VIA FAMILY BASED VISA PETITION



Select Grounds of Inadmissibility, Exceptions & Waivers

	SELECTED GROUNDS OF INADMISSIBILITY	EXCEPTIONS & WAIVERS	SELECTED AUTHORITIES
Health Related Grounds			
212(a)(1)(A)	(i) communicable disease of public health significance	Section 212(g)(1) of the Act.	USCIS, *Policy Manual*, Vol. 9, Part C, Waivers for Health-Related Grounds of Inadmissibility (Jul. 21, 2015), *available at* https://www.uscis.gov/policymanual/HTML/PolicyManual.html
	(ii) vaccinations, except for orphans	Section 212(g)(2) of the Act.	
	(iii) physical or mental disorder with associated harmful behavior	Section 212(g)(3) of the Act.	
	(iv) drug abuse or drug addiction, except if in remission	None.	
Criminal & Related Grounds			
212(a)(2)	(A)(i)(I) crimes involving moral turpitude (CIMT), except petty offense & juvenile offense	Section 212(h) of the Act.	*Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015); *Matter of Paek*, 26 I&N Dec. 403 (BIA 2014); *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013).
	(A)(i)(II) drug offenses	Section 212(h) of the Act (very limited).	
	(B) multiple criminal convictions	Section 212(h) of the Act.	
	(C) drug traffickers	None.	
	(D) prostitution & commercialized vice	Section 212(h)(1)(a) of the Act.	
Public Charge			
212(a)(4)	An alien who is a public charge is inadmissible.	Section 213A of the Act, Affidavit of Support requirement.	USCIS, *Affidavit of Support Procedures* (Aug. 29, 2013), *available at* http://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-support

Labor Certification			
212(a)(5)	(A) an alien who seeks to enter the U.S. to perform skilled or unskilled labor is inadmissible unless he has a labor certification.	None.	*Matter of Butt*, 26 I&N Dec. 108 (BIA 2013); *Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009).
Illegal Entrants & Immigration Violators			
212(a)(6)	(A) an alien in the U.S. who has not been inspected and admitted or paroled is inadmissible.	Aliens grandfathered under section 245(i) of the Act; VAWA petitioners; Special immigrant juveniles.	
	(B) failure to attend removal hearing	None.	
	(C)(i) fraud & misrepresentation of material fact	Section 212(i) of the Act; Section 237(a)(1)(H) of the Act.	*Matter of Cervantes*, 22 I&N Dec. 560 (BIA 1999); *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015); *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998).
	(C)(ii) false claims to US citizenship made on or after 9-30-96, except for certain children	None.	*Matter of Bett*, 26 I&N Dec. 437 (BIA 2014); *Matter of Barcenas-Barrera*, 25 I&N Dec. 40 (BIA 2009).
	(D) stowaway	None.	
	(E) alien smuggler	Section 212(d)(11) of the Act.	*Matter of Compean*, 21 I&N Dec. 51 (BIA 1995).
	(F) alien subject to a final order under section 274C of the Act.	Section 212(d)(12) of the Act.	

Document Requirements			
212(a)(7)(A)	immigrant without an immigrant visa or improperly issued visa discovered at POE	Section 212(k) of the Act.	*Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987).
Previous Removal or Unlawful Presence			
212(a)(9)	(A)(i) an arriving alien who was ordered removed and who again seeks admission within 5 years of the date of such removal is inadmissible.	Except that AG may consent to alien's reapplying for admission.	
	(A)(ii) an alien who was ordered removed or who departed the U.S. with an outstanding removal order and who seeks admission within 10 years of the date of the alien's departure is inadmissible.	Except that AG may consent to alien's reapplying for admission.	
	(B)(i)(I) with certain exceptions, an alien who is unlawfully present for more than 180 days but less than 1 year & who voluntarily departed the U.S. before proceedings commenced is inadmissible for 3 years.	Section 212(a)(9)(B)(v) of the Act.	
	(B)(i)(II) with certain exceptions, an alien who is unlawfully present for more than 1 year, and who again seeks readmission within 10 years of the date of the alien's departure is inadmissible.	Section 212(a)(9)(B)(v) of the Act.	*Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012); *Matter of Lemus*, 25 I&N Dec. 734 (BIA 2012).

212(a)(9)	(C)(i)(I) an alien who has been unlawfully present for an aggregate period of more than 1 year and who enters or attempts to enter the U.S. without being admitted	No, except that DHS Secretary may consent to alien's reapplying after 10 years outside the United States. DHS may waive in the case of certain VAWA petitioners.	*Correo-Ruiz v. Lynch*, 809 F.3d 543 (9th Cir. 2015); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015); *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012); *Matter of Diaz*, 25 I&N Dec. 188 (BIA 2010); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007).
	(C)(i)(II) alien who has been ordered removed and who enters or attempts to enter the U.S. without being admitted	No, except that DHS Secretary may consent to alien's reapplying after 10 years outside the United States. DHS may waive in the case of certain VAWA petitioners.	*Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013); *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); USCIS, *Additional Guidance for Implementation of the Settlement Agreement in Duran Gonzalez v. Dep't of Homeland Security*, PM-602-0121 (Aug. 25, 2015).

Analyzing Adjustment of Status Claims

April 21, 2016

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Disclaimer: This training presentation is intended for educational purposes only. It is not intended as a comprehensive or definitive statement on all issues concerning adjustment of status, nor does it represent all interpretations or perspectives on adjustment of status. The information set forth in this document does not represent the positions of the Board of Immigration Appeals, the Executive Office for Immigration Review, the Department of Justice, the Attorney General, or the United States Government.

Learning Objectives

1. Know the core requirements for 245(a) and 245(i) adjustment.
2. Know the core requirements for a 212(h) waiver.
3. Know the factors to consider in determining whether to continue, reopen or close proceedings for adjustment.

Jurisdiction

An alien (other than an arriving alien) in removal proceedings files the adjustment application with the IJ.

An alien (other than an arriving alien) whose adjustment application was denied by USCIS can renew the application in removal proceedings.

Jurisdiction Arriving Aliens

Define arriving alien. 8 C.F.R. § 1001.1(q).

Generally, an arriving alien files the adjustment application with USCIS.

Matter of Silitonga, 25 I&N Dec. 89 (BIA 2009)

Adjustment Eligibility Criteria

1. Eligible to receive an immigrant visa
2. Immigrant visa is immediately available
3. Inspected and admitted or paroled into the United States.
4. Not barred
5. Admissible under 212(a) or eligible for a waiver
6. Favorable exercise of discretion

Immigrant Visa Eligibility

Immigrant Visa Categories:

1. Immediate relatives
2. Family-based categories, including VAWA
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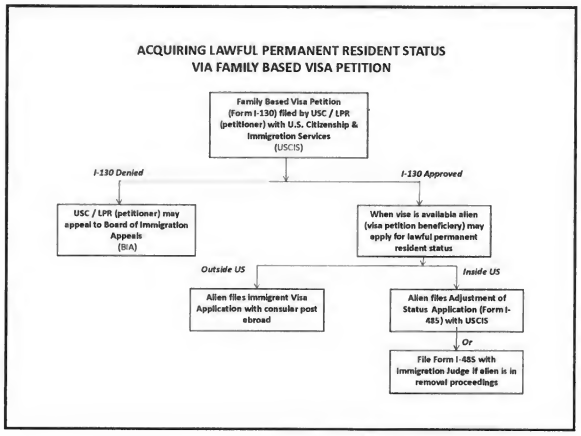

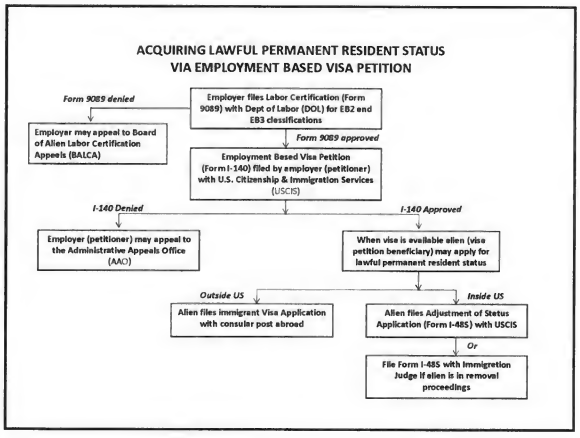

Immigrant Visa Eligibility

Section 204(j) of the Act

Matter of Marcal Neto,
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For aliens in the preference categories, when an alien's *priority date* is earlier than the *cut-off date* referenced in the Visa Bulletin, a visa is available.

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F3	22NOV04	22NOV04	22NOV04	01OCT94	22DEC93
F4	22JUL03	22JUL03	22JUL03	08APR97	01SEP92

CSPA

1. Children of USCs. Section 201(f)
2. Children of LPRs. Section 203(h)
3. Children of refugees and asylees. Sections 207 and 208

Inspected & Admitted or Paroled

A few classes of aliens are exempt from this requirement:

- VAWA applicants
- Special immigrant juveniles
- Grandfathered aliens

Inspected & Admitted or Paroled

Section 101(a)(13)(A)

Matter of Quilantan,
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An alien paroled into the U.S. pursuant to section 212(d)(5) of the Act satisfies the parole requirement for adjustment.

An alien's conditional parole from detention pursuant to section 236(a) of the Act does not satisfy the parole requirement. *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010).

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Issue: Has an alien granted Temporary Protected Status (TPS) is considered to have been admitted for adjustment eligibility purposes?

The Sixth Circuit holds a TPS grant constitutes an admission. *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013).

Statutory Bars - example

Under section 245(c)(2) of the Act, *other than an immediate relative*, an alien who has worked without authorization or who is in an unlawful immigration status or who has failed to maintain continuously a lawful status since entry into the U.S. is ineligible for adjustment.

245(c)(2) Bar

Applicants with TPS
Section 244(f)(4) of the Act

Admissibility

To establish adjustment eligibility an alien must show he is admissible within the meaning of section 212(a) of the Act

Waivers of Inadmissibility

If an alien is inadmissible under section 212(a), he is ineligible for adjustment unless he can establish eligibility for a corresponding waiver of inadmissibility.

A chart is included in your training materials which shows select grounds of inadmissibility and the corresponding waivers of inadmissibility.

212(a)(9)(C)(i)(I)

Matter of Briones
24 I&N Dec. 355 (BIA 2007)

212(a)(9)(C)(i)(II)

Matter of Torres-Garcia
23 I&N Dec. 866 (BIA 2006)

Adjustment in Discretion

Matter of Arai, 13 I&N Dec. 494 (BIA 1974)

Positive factors: family ties in the U.S., length of residence in the U.S., hardship to alien and family to travel abroad to apply for an immigrant visa.

Generally, in the absence of adverse factors, adjustment will ordinarily be granted in discretion.

245(i) Adjustment

Additional requirements for 245(i) adjustment:

1. The alien must be a "grandfathered alien"
2. VP or LC properly filed & approvable when filed
3. Physical presence in the U.S.

Aliens Ineligible for Adjustment

Aliens ineligible for adjustment may still be eligible to obtain an immigrant visa through consular processing.

Section 212(h) Waiver Eligibility

An alien convicted of crime rendering him inadmissible under section 212(a)(2)(A)(i)(I), (B), (D) & (E) or (A)(i)(II) (insofar as it relates to a single offense of simple possession of 30 grams or less marijuana) is eligible for a 212(h) waiver.

Section 212(h) Waiver

Section 212(h)(1) provides 3 distinct waivers:

(A) Alien is inadmissible only for prostitution or commercialized vice OR activities rendering alien inadmissible occurred more than 15 years prior & alien has been rehabilitated

(B) Alien can show extreme hardship to QF M

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1. Alien convicted of murder, or criminal acts involving torture or the conspiracy or attempt to commit the same.

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Except in extraordinary circumstances, discretion will not be favorably exercised in cases involving violent or dangerous crimes. 8 C.F.R. § 1212.7(d).

Extraordinary circumstances include national security or foreign policy considerations or exceptional and extremely unusual hardship.

Motions

Sections 242(a)(2)(B)(i) and (ii) of the Act

Kucana v. Holder, 558 U.S. 233 (2010)

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Challenge

Make it Stick

Thank you

Analyzing Adjustment of Status Claims

April 21, 2016

Anne J. Greer and Teresa L. Donovan

Disclaimer: This training presentation is intended for educational purposes only. It is not intended as a comprehensive or definitive statement on all issues concerning adjustment of status, nor does it represent all interpretations or perspectives on adjustment of status. The information set forth in this document does not represent the positions of the Board of Immigration Appeals, the Executive Office for Immigration Review, the Department of Justice, the Attorney General, or the United States Government.

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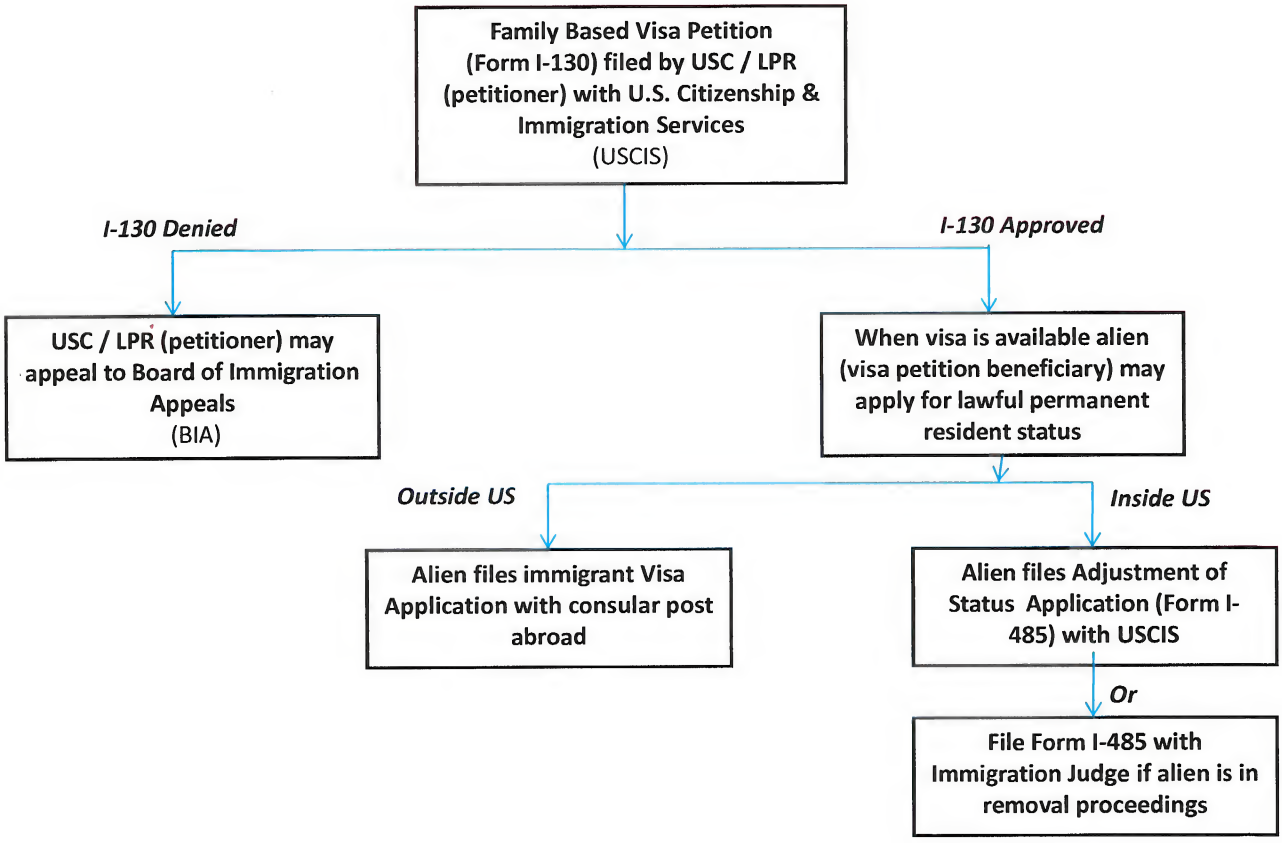

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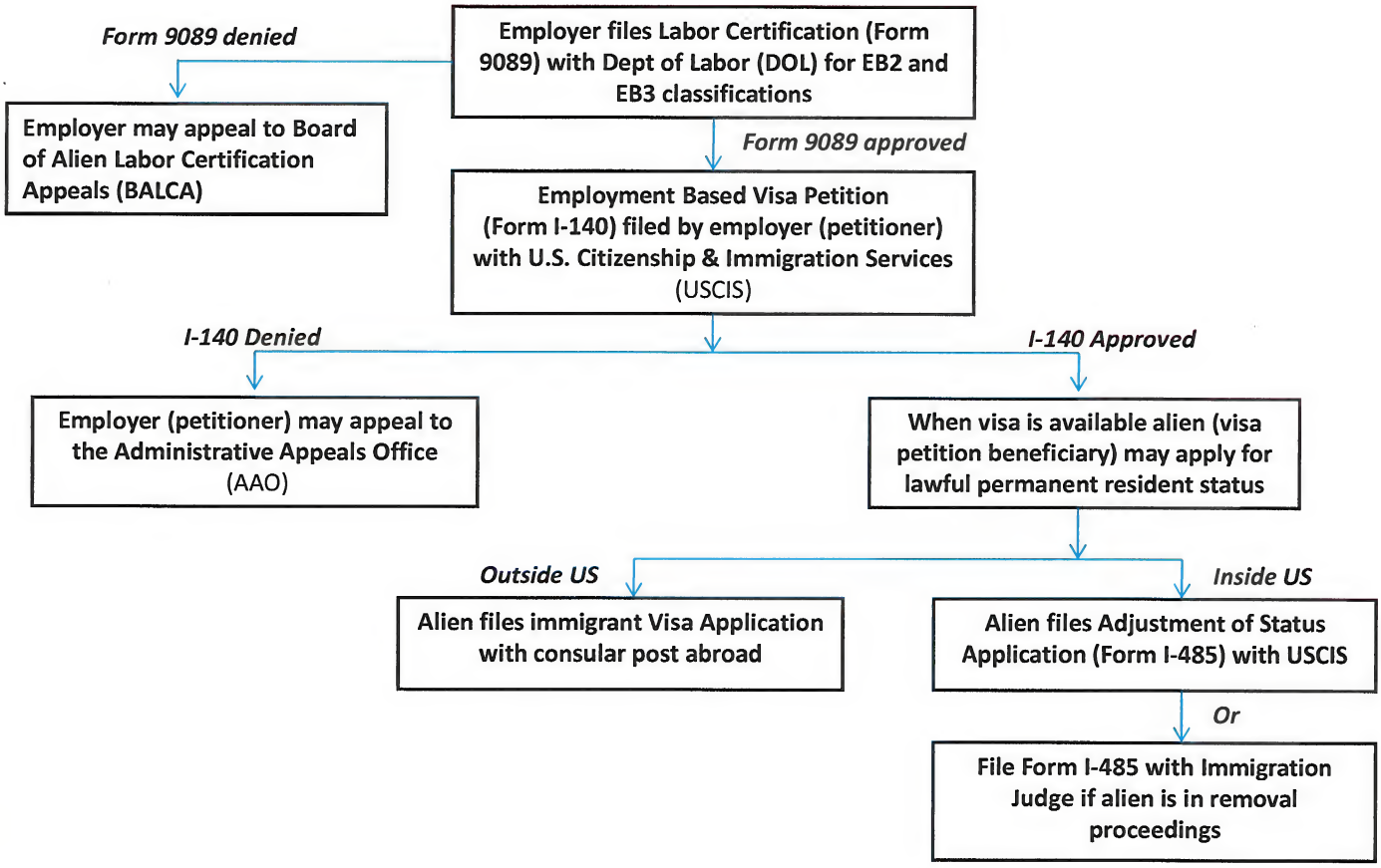

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